In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1140

KEITH LOWE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the court of appeals' affirmance of the district court's dismissal of their suit to compel the issuance of an immigrant visa to petitioner Lowe, a non-resident alien. Petitioner Lowe contends that the action of the United States consular officer in Jamaica in refusing to issue a visa violated the Immigration and Nationality Act of 1952. The other petitioners, who are American citizens holding faculty positions at the University of California at San Diego where petitioner Lowe had been offered a teaching post, contend that the action of the consular officer violated their First Amendment rights.

Petitioner Lowe is a citizen of Jamaica who had obtained his undergraduate and graduate education in the United States while holding a student visa (App. 1-2).[1] In 1967, he was appointed an assistant professor

[1] "App." refers to the appendix filed in the court of appeals.

of literature at the University of California at San Diego and he applied for an immigrant visa at the United States Consulate in Kingston, Jamaica (App. 4). On March 24, 1969, he appeared at the Consulate in Kingston for a medical examination, and on March 25, 1969, was accorded an interview with a Vice Consul. During the interview the Vice Consul discussed with Lowe his membership in or active support of several named communist or radical left organizations during his residence in the United States as a student (App. 4-5).[2] On May 13, 1969, Lowe appeared at the Consulate and was informed by letter that he had been found ineligible to receive a visa under the provisions of Section 212(a)(28) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(28)) because of his membership in or active support of groups falling within the classes enumerated in that section (App. 6, 14).[3]

Petitioners filed suit in the United States District Court for the District of Columbia to compel the issuance of an immigrant visa to petitioner Lowe. Petitioners' request for the convening of a three-judge court to consider the constitutionality of 8 U.S.C. 1182(a)(28) was granted.

The government moved to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (App. 11). On April 25, 1973, the three-judge court held that the constitutional issue raised by petitioners had been decided adversely to their position in *Kleindienst* v. *Mandel*, 408 U.S. 753, and accordingly the three-judge court was dissolved (App. 12). On June 22, 1973, a single judge district court granted the gov-

[2]For example, the Vice Consul discussed with him his membership in or close affiliation with the "May 2d movement," an offshoot of the Progressive Labor Party (App. 4).

[3]Section 212(a)(28) is set forth in pertinent part at Pet. 3-7.

ernment's motion to dismiss without opinion (App. 13). The court of appeals affirmed the order of the district court, also without opinion (Pet. App. A).

1. The district court properly dismissed petitioners' complaint. An unadmitted and non-resident alien has no constitutional right of entry to this country as a non-immigrant or otherwise. *Kleindienst* v. *Mandel, supra*, 408 U.S. at 762. The exercise of the power to exclude aliens is the exclusive prerogative of the political branches of the government and, absent express legislative authorization, it is within the discretion of those branches. *Knauff* v. *Shaughnessy*, 338 U.S. 537, 543; *Kleindienst* v. *Mandel, supra*, 408 U.S. at 765-767.

2. Petitioners other than Lowe have no greater claim to relief. Their invocation of the First Amendment does not alter the fact that the relief they seek—the issuance of an immigrant visa to Lowe—is an impermissible attempt to secure judicial control of matters within the discretion of the Executive Branch.

Petitioners' reliance on *Kleindienst* v. *Mandel, supra*, to support their claim is misplaced. In *Mandel*, plaintiffs asserted a First Amendment right to the temporary admission of an alien under provisions that permitted the waiver of entry requirements in the discretion of the Attorney General. Plaintiffs conceded that First Amendment rights would not override a blanket exclusion of classes of aliens (408 U.S. at 767), but they maintained, relying on the legislative history, that Congress intended the waiver provisions to be exercised "for humane reasons and for reasons of public interest" (*ibid.*). Thus, they argued that the decision whether to grant a waiver must be limited by First Amendment rights and, specifically, that such rights must prevail "at least where the Government advances no justification for failing to grant a waiver." 408 U.S. at 767-768.

This Court rejected the broad First Amendment rationale advanced in *Mandel*, finding that it would prove too much because "[i]n almost every instance of an alien excludable under §212(a)(28), there are probably those who would wish to meet and speak with him" (408 U.S. at 768). The broad First Amendment rationale would either nullify the congressional grant of discretion to the executive or it would require review of exercise of that discretion by such undesirable standards as the size of the audience or the probity of the speaker's ideas (408 U.S. at 768-769).

Nor was it necessary for this Court to consider plaintiffs' more limited claim that First Amendment rights must prevail in the absence of justification of a denial of a waiver because the Attorney General had in fact given a "facially legitimate and bona fide" reason for his action (408 U.S. at 769).

The question not decided in *Mandel*—"[w]hat First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced" (408 U.S. at 770)—is not presented here. Petitioners (Pet. 14) concede that Lowe's exclusion "involves no exercise of discretion." Petitioners' contention (Pet. 14) that their claim is supported by *Mandel* because the exclusion of Lowe raises, apart from constitutional claims, "solely an issue of a statutory right" and fails to meet the "facially legitimate" test stands the holding of *Mandel* on its head.

As shown earlier, *Mandel* reaffirmed that an alien has no constitutional or statutory right to entry into this country. Petitioners rely on an asserted First Amendment right as giving them standing to litigate Lowe's statutory claims. This is the same kind of broad First Amendment claim that was rejected in *Mandel*.

Since colorable statutory claims can be alleged in almost every case of an excluded alien, acceptance of petitioners' position would, as in *Kleindienst* v. *Mandel, supra*, either effectively nullify Congress' plenary power over matters of immigration, or require judicial review based on inappropriate standards such as the size of the alleged audience and the probity of the speaker's (alien's) ideas.[4]

Petitioners' claim is dependent upon Lowe's status. Neither he nor they are entitled to compel the issuance of a permanent immigrant visa.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]Petitioners erroneously rely (Pet. 16) on *Chew* v. *Colding*, 344 U.S. 590, as support for their contention that an alien outside the United States may obtain judicial review of "claimed acts of wrongdoing by the Executive." In *Chew* an alien who held a permanent resident visa, but who was detained at Ellis Island in New York harbor upon his return from an ocean voyage, was permitted to challenge deportation proceedings instituted against him. This Court distinguished *Knauff* v. *Shaughnessy, supra*, on the ground that (344 U.S. at 596) "[i]t relates to the rights of an alien entrant, and does not deal with the question of a resident alien's right to be heard."